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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-419

PITTSBURGH PRESS COMPANY, *Petitioners,*

vs.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS and THE CITY OF PITTSBURGH,

and

THE NATIONAL ORGANIZATION FOR WOMEN, INC., *Respondents.*

Brief on Behalf of the California Fair Employment Practice Commission by the Attorney General of the State of California as Amicus Curiae in Support of Respondents Pittsburgh Commission on Human Relations, et al.

Jurisdictional Statement

There is in the state government of California, in the Human Relations Agency, the Department of Industrial Relations. Within that Department is the Division of Fair Employment Practices, which includes the State Fair Employment Practice Commission.[1] (Cal. Labor Code §§ 50, 56, 1414.)

This amicus curiae brief is respectfully submitted on behalf of the California FEPC, by and through the California Attorney General pursuant to Rule 42(4) of this Honorable Supreme Court of the United States.

[1]Hereafter referred to as California FEPC.

Preliminary Statement

Amicus curiae files this brief urging that the January 27, 1972 Order and Decision of the Commonwealth Court of Pennsylvania be affirmed.

Interest of Amicus Curiae

The California Fair Employment Practice Act (Cal. Labor Code §§ 1410-1433) defines unlawful employment practices as prohibiting discrimination in employment based on sex, as well as race, religion, color, national origin, or ancestry. The California FEPC is empowered to prevent discrimination in employment and in this capacity determines whether an unlawful employment practice has been committed based upon the California Fair Employment Practice Act. Section 1420 of the Fair Employment Practice Act reads as follows:

> "1420. It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:
>
> ". . . .
>
> "(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination."

Section 1420, subdivision (f) also provides that it shall be an unlawful practice:

> "(f) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so."

The State of California has declared and recognized that "the practice of denying employment opportunity and discriminating in the terms of employment on account of race, religion, creed, color, national origin, ancestry or sex, foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interests of employees, employers, and the public in general." Cal. Labor Code § 1411. It is the opinion of the California FEPC that segregation of advertisements by sex is discrimination and denial of employment opportunity within the meaning of the express law of the State of California.

The scope of the above statutory scheme as it relates specifically to newspapers, was interpreted by the California Attorney General in Opinion Number 71-46 dated January 21, 1972.[2]

The California statutes are substantially similar to the Pittsburgh ordinance under attack here. Therefore, a decision affirming the lower court is of great importance to the continued enforcement of the California Fair Employment Practice Act.

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[2]A discussion of the Opinion appears below, and a copy is attached as Exhibit A.

ARGUMENT

I

The Law of the State of Californin Is That Under Certain Circumstances a Newspaper Does "Aid or Abet" in Unlawful Employment Practices by Maintaining Help Wanted Ads in Columns Segregated by Sex

In the amicus curiae brief submitted by the American Newspaper Publishers Association, footnote (1) reads, "The California Attorney General has held that newspapers do not aid or abet an unlawful employment practice by maintaining gender-designated classified employment advertising headings. Attorney General Opinion No. 71/46." The use of this opinion in support of the American Newspaper Publishers Association's position misconstrues the result reached by quoting merely a portion of the actual opinion.

In fact, the opinion concluded:

> ". . . that in order to aid or abet in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act, the newspaper must do some act to assist, aid or promote the unlawful discrimination by the employer or employment agency with knowledge of the unlawfulness of the discrimination. Therefore, a newspaper does not aid or abet in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act merely by printing 'help wanted ads' in columns segregated by sex.
>
> "However, a newspaper is a person within the meaning of section 1420, subdivision (f) of the Fair Employment Practice Act and therefore, by

printing help wanted ads in columns segregated by sex where the newspaper has knowledge that there is no bona fide occupational qualification for the jobs listed aids or abets in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act.

"Moreover, under some circumstances, where such segregation is not requested by the employer or the employment agency, the conduct of a newspaper in suggesting or insisting upon such segregation may constitute incitement or coercion in violation of section 1420, subdivision (d).

"The question of whether a newspaper has knowingly aided, abetted, incited or coerced an employer or employment agency in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act will be a question of fact which may be determined on circumstantial evidence."

The construction of the statute as requiring "knowledge" was based on the unique wording and requirements of the California statute. Although the statutes are similar, the interpretation of the California statute is not relevant to an interpretation of the Pittsburgh Ordinance involved herein.

The Pittsburgh ordinance is distinguishable from the California enactment, encompassing within its terms any person who would ". . . aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice." The breadth of this wording is inclusive of conduct that might not be within the purview of the California law. Further, the instant matter contains a finding of fact, certainly sup-

ported by substantial evidence, that the newspapers did, in fact, participate in the doing of acts made unlawful in Pittsburgh.

In reliance upon the Opinion by the Attorney General the California FEPC has contacted all publishers of newspapers within the State of California. Although at this time not every newspaper within the State has complied with the California law, major newspapers which have eliminated segregated help wanted column headings include: Los Angeles Times, San Francisco Chronicle, San Francisco Examiner, Oakland Tribune, Sacramento Bee, Fresno Bee, Modesto Bee, Sacramento Union, Santa Monica Evening Outlook, and the Santa Barbara News Press.

II

Amicus Curiae Supports the Contention That the Pittsburgh Ordinance Is Properly Designed to Eliminate a Recognized Discriminatory Practice

The California FEPC supports the decision of the Commonwealth Court of Pennsylvania, and the contentions of respondents. Respondents have presented ample legal and factual support to sustain the constitutionality of the ordinance, and further discussion of these matters would be merely repetitive.

We would, however, point out to the court that California, as well as numerous other states are gravely concerned over the proliferation of practices, which freeze the *status quo*, the end product of which is discrimination.

The states have been emphatic in the campaign against sex discrimination in the area of advertising by making it unlawful for a newspaper to maintain employment columns segregated on the basis of sex.

The Iowa Civil Rights Commission recognized the crucial role newspaper advertising can play in discriminatory hiring practices by employers and employment agencies and apparently to eliminate all temptation of any discriminatory practices in advertising, adopted the following guidelines:

"Section 1.1(105A). Cease Use—1.1(1) All newspapers within the State of Iowa shall cease to use sex-segregated want ads—e.g. 'Male Help Wanted', 'Female Help Wanted', and 'Male and Female Help Wanted' or 'Men—Jobs of Interest', 'Women—Jobs of Interest', and 'Men and Women'.

'1.1(2) Any newspapers failing to comply with subrule 1.1(1) shall be deemed in violation of the Iowa Civil Rights Act, sections 105A.7 and 105A.8 and legal proceedings shall henceforth be initiated against such newspaper.

"1.1(3) The Iowa Civil Rights Commission will regard any publication of sex preference for a job to be in violation of the Iowa Civil Rights Act and, therefore suggests that all Iowa newspapers refrain from publishing any sex preference which an employer in its job order may want printed."

(Guidelines adopted by the Iowa Civil Rights Commission pursuant to Sec. 105A.5(9) of Iowa Civil Rights Act, CCH ¶ 22,875.)

Likewise Massachusetts took an unequivocal stand:

"The maintenance of newspapers and other publishers of help-wanted classified columns segregated by sex is unlawful. Such columns act to

aid and abet, or attempt to aid and abet, advertisers in violation of Chapter 151B."

(Guidelines and Regulations adopted by the Massachusetts Commission Against Discrimination pursuant to Chapter 151B § 4 and § 5 of Massachusetts General Laws, CCH ¶24,051.)

There are other states with similar prohibitions against sex segregated employment columns. And cities, such as New York, have adopted ordinances that have caused newspapers to desegregate their employment advertising, while other newspapers, such as *The Christian Science Monitor* and *Newsday* have voluntarily integrated their "Male and "Female" columns.

All these actions were taken in recognition of the fact that publishing advertisements in columns segregated on the basis of sex is discriminatory.

The Citizen's Advisory Council of the Status of Women issued a Memorandum to the Equal Employment Opportunity Commission in October 1965 and in it they mentioned some of the difficulties:

"Separate 'help-wanted men' and 'help-wanted women' columns in newspapers serve only to advise job applicants not to apply where they are not wanted, thus perpetuating discrimination. Moreover, sex-segregated newspaper columns actually encourage employers to place a sex label on jobs, which unintentionally, restricts the employment opportunities of both men and women."

(See 112 Cong. Rec. 13692, June 20, 1966.)

Congresswoman Martha Griffiths of Wisconsin in a speech before the United States House of Representatives (112 Cong. Rec. 13689, June 20, 1966) stated that she was "convinced that advertising in columns headed by sex . . . is most pernicious because it reinforces prejudicial attitudes limiting women to the less rewarded and less rewarding types of work".

The Special Subcommittee on Education of the House of Representatives entered into the record of July 1, 1970, during hearings on discrimination against women, two opinions bearing on this problem. Gerald H. F. Gardner in his article "Want-Ads Tomorrow: Neutral With Respect to Sex," compares the sex discriminatory advertisements of today with the race discriminatory advertisements of the past:

> "The present format of want-ads is a relic from times when people were less sensitive to injustice. There used to be categories labelled 'Colored-Male' and 'Colored-Female'. When these were made illegal, and then became offensive to the public, the newspapers merely dropped the categories. But the principle remained. Jobs continued to be categorized according to the social standing and caste of the reader. The reader is expected to say 'I am female, therefore I need to scan only Female sections'—just as in the old days a colored person was expected to say 'I am black, therefore I need only scan the colored sections.' "
>
> (Hearing Before the Special Subcommittee on Education of the Committee on Education and Labor, House of Representatives, Ninety-First Congress, Second Session on Section 805 of H.R. 16098, Part 2, p. 894.)

Also entered into the record was the testimony of Sandra L. Bem and Daryl J. Bem, Department of Psychology, Carnegie-Mellon University, when they appeared before the Pittsburgh Human Relations Commission in February 1970. Their empirical studies showed that classification of jobs under sex-segregated headings markedly discouraged women from considering those jobs classified as "Male Interest." In their testimony they stated that an employer who wishes to hire only males

> "can place his ad in the 'Male Interest' column, secure in the knowledge that this will effectively discourage female applicants. It is in this way that sex-segregated want ads can 'aid and abet' discrimination in employment on the basis of sex". (Hearings before the Special Subcommittee on Education, *supra*, p. 891.)

Clearly then, from all this information, both empirical and intuitive, the publication of employment advertising in columns segregated on the basis of sex is discriminatory. Common sense says publicizing employment advertising in columns segregated on the basis of sex is a blatant attempt to undermine the true purpose of anti-sex discrimination legislation.

Conclusion

This case presents to the court a matter of considerable interest to numerous states, local and federal agencies, and private individuals who are committed to the elimination of discrimination in all forms. For the above reasons, and those set forth by respondents, it is respectfully requested that the judgment of the Commonwealth Court of Pennsylvania be affirmed.

Respectfully submitted,

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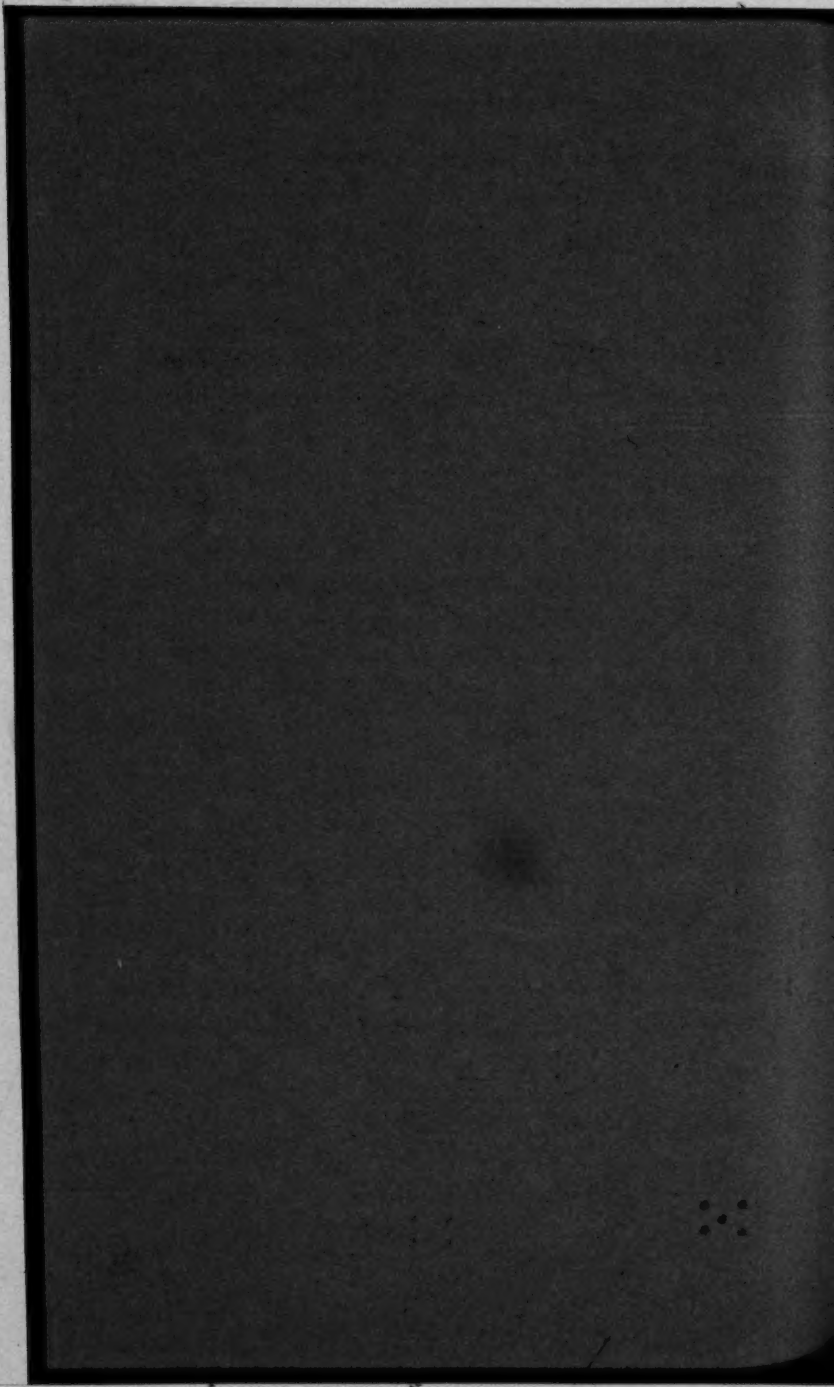

EXHIBIT "A."

Opinion of the Attorney General.

Opinion No. 71-46—January 21, 1972

SUBJECT: PRINTING BY NEWSPAPERS OF "HELP WANTED ADS" IN COLUMNS SEGREGATED BY SEX—A newspaper does not aid or abet in the doing of acts forbidden by the Fair Employment Practice Act by merely printing "help wanted ads" in columns segregated by sex; a newspaper must do some act to assist, aid, or promote the unlawful discrimination by the employer or employment agency with knowledge of the unlawfulness of the discrimination; the question of whether a newspaper has violated provisions of the Fair Employment Practice Act will be a question of fact which may be determined on circumstantial evidence.

Requested by: DIRECTOR, DEPARTMENT OF INDUSTRIAL RELATIONS

Opinion by: EVELLE J. YOUNGER, Attorney General

Andrea Sheridan Ordin, Deputy

William C. Hern, Director of the Department of Industrial Relations, has requested an opinion on the following question:

When a newspaper prints "help wanted ads" in columns segregated by sex, does the newspaper aid or abet in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act? (Labor Code §§ 1410 et seq.)

The conclusion is:

In order to aid or abet in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act, the newspaper must do some act to assist, aid, or promote the unlawful discrimination by the employer or employment agency with knowledge of the unlawfulness of the discrimination. Therefore, a newspaper does not aid or abet in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act merely by printing "help wanted ads" in columns segregated by sex.

However, a newspaper is a person within the meaning of section 1420, subdivision (f) of the Fair Employment Practice Act and therefore, by printing help wanted ads in columns segregated by sex where the newspaper has knowledge that there is no bona fide occupational qualification for the jobs listed aids or abets in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act.

Moreover, under some circumstances, where such segregation is not requested by the employer or the employment agency, the conduct of a newspaper in suggesting or insisting upon such segregation may constitute incitement or coercion in violation of section 1420, subdivision (f).

The question of whether a newspaper has knowingly aided, abetted, incited, or coerced an employer or employment agency in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act will be a question of fact which may be determined on circumstantial evidence.

ANALYSIS

The Fair Employment Practice Act (Labor Code sections 1410-1433) since its amendment in 1970 prohibits discrimination in employment based on sex, as well as race, religious creed, color, national origin, or ancestry.

Section 1420, subdivision (d) of the Fair Employment Practice Act, as amended, reads as follows:

> "1420. It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:
>
> ". . . .
>
> "(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, religious creed, color, national origin, ancestry, or sex or any intent to make any such limitation, specification or discrimination."

Section 1420, subdivision (f) also provides that it shall be an unlawful practice:

> "(f) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so."

There is little question that when an employer or an employment agency submits a help wanted ad to a newspaper under a classification segregated by sex, the

employer or employment agency causes to be printed a publication which "expresses, directly or indirectly," a limitation as to sex. Such a limitation is directly forbidden by the language of section 1420, subdivision (d) of the Fair Employment Practice Act unless based upon a bona fide occupational qualification or where based upon applicable security regulations.

Although no cases in California specifically construe the scope of the bona fide occupational qualification exception of the Fair Employment Practice Act when applied to sex discrimination, the Equal Opportunity Commission Guidelines on Discrimination Because of Sex state that the bona fide occupational qualification exception in the Federal Act, 42 U.S.C. 2000e-3(b) "should be interpreted narrowly." 29 C.F.R. § 1604 (1971).

In pertinent part, the Guidelines promulgated by the Commission read:

"....

"(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

"....

"(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

"(iii) The refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers except as covered specifically in subparagraph (2) of this paragraph.

". . . .

"(2) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, *e.g., an actor or actress.*" 29 C.F.R. § 1604.1 (1971).

See, also, Sail'er Inn v. Kirby, 5 Cal. 3d 1, 14-15 (1971); *Rosenfeld v. Southern Pacific Company,* 444 F.2d 1219, 1224-1225 (9th Cir. 1971); *Diaz v. Pan Am. World Airway, Inc.,* 442 F.2d 385 (5th Cir. 1971), *cert. denied,* .... U.S. ...., 40 U.S.L.W. 3212 (Nov. 9, 1971); *Weeks v. Southern Bell Telephone & Telegraph Co.,* 408 F.2d 228 (5th Cir. 1969).

We believe that the Guidelines and the interpretation of the above cases will control the interpretation of the equivalent bona fide occupational qualification language in the California statute. It therefore follows that the bona fide occupational qualification provision in the Fair Employment Practice Act, like the provision in the federal statute, will be narrowly construed so that it will be unlawful in practically all cases for employers and employment agencies to cause to be printed any advertisement expressing a limitation as to sex.

Of course, a finding that employers and employment agencies cause to be printed any advertisement which expresses a limitation as to sex where there is no bona fide occupational qualification violates section 1420, subdivision (d), does not answer our inquiry here.

Section 1420, subdivision (d) by its terms is limited to employers and employment agencies. In our opinion, a newspaper, when acting in its capacity of accepting advertising for its classified section, is neither an employer or employment agency within the meaning of section 1420, subdivision (d). *See Brush v. San Francisco Newspaper Printing Company*, 315 F. Supp. 577 (N.D. Cal. 1970).

However the prohibitions of section 1420(f) are not limited to any specifically named entities, but are applicable to all "persons." Section 1413 of the Labor Code defines person to include:

> "(a) 'Person' includes one or more individuals, partnerships, associations or corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."

Therefore a newspaper, whether a partnership, corporation or one or more individuals, is a person within the meaning of section 1420, subdivision (f) and is capable of aiding, abetting, inciting, compelling or coercing the doing of acts forbidden by this statute.

The terms "aid" or "abet" have not been defined in context of the Fair Employment Practice Act. However, there is substantial law defining those terms in California as used in Penal Code section 31. Penal Code section 31 reads in relevant part:

> "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid *and* abet in its commission . . . are principals in any crime so committed." (Emphasis added.)

It should be noted that the Labor Code section 1420, subdivision (f) being construed here, unlike Penal Code section 31 set out above, is not drafted in the conjunctive. Labor Code section 1420, subdivision (f) makes it an unlawful practice for any person to aid, abet, incite, compel, *or* coerce the doing of any of the acts forbidden under this part. In drafting the statute in the disjunctive, it can be argued that it was the intent of the Legislature to draw a distinction between the terms used and to set forth alternative grounds for liability. Such construction of the statute would be consonant with the traditional rules of statutory construction of disjunctive or conjunctive words. *See*, Sutherland, Statutory Construction, § 4923 (3rd Ed. 1963). As noted in *Houge v. Ford*, 44 Cal. 2d 706, 712 (1955), in its ordinary sense the function of the word "or" is to mark an alternative such as "either this or that." The unnatural construction of "or" as "and" is sanctioned only when such construction is found necessary to carry out the obvious intent of the Legislature where such intent may be gleaned from the context in which the word is used. *See also, People v. Smith*, 44 Cal. 2d 77 (1955); *Consolidated Rock etc. Co. v. State of Cal.*, 57 Cal. App. 2d 959 (1943).

Such a conclusion also could be supported by the fact that the terms "aid" and "abet," at least in California, have long had different meanings. The word "aid" standing alone does not imply guilty knowledge of felonious intent, *People v. Dole*, 122 Cal. 486, 492 (1898); *People v. Etie*, 119 Cal. App. 2d 23, 28 (1953); whereas abet is defined to mean "*knowingly* and with criminal intent promote, encourage or instigate, by act or counsel, or by both . . . ." (Emphasis added.) *People v. Ellhamer*, 199 Cal. App. 2d 777,

781 (1962). The term "incite" according to *Piluso v. Spencer*, 36 Cal. App. 416, 421 (1918), "carries with it the idea of *encouragement*, persuasion, and inducement. . . ." (Emphasis added.)

However, we believe without a more explicit expression of legislative intent, that the more persuasive argument is that section 1420, subdivision (f) was intended to be construed as is Penal Code section 31. Therefore we conclude that a person cannot violate the aiding or abetting provision of section 1420, subdivision (f) unless he has knowledge of the unlawfulness of the act.

Whether or not the requisite elements of aiding or abetting a violation of section 1420, subdivision (d) of the Fair Employment Practice Act exist in a given case ordinarily will be a question of fact which may be determined upon circumstantial evidence. *People v. Herrera*, 6 Cal. App. 3d 846, 852 (1970); *People v. Fleming*, 191 Cal. App. 2d 163, 168-169 (1961).

The Court of Common Pleas in Pennsylvania in *Appeal of the Pittsburgh Press Co.*, 3 E.P.D. ¶ 8154 (1970), also decided that a newspaper could aid or abet in the violation of a municipal ordinance which read that it was unlawful:

> ". . . .
>
> "(e) For any employer, employment agency or labor organization to publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to employment or membership which indicates any discrimination because of race, color, religion, ancestry, national origin or place of birth or sex."

The ordinance also is drafted with the following prohibition against any person aiding or abetting in an unlawful employment practice:

> "(j) For any person, whether or not an employer, employment agency or labor organization, to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice by this ordinance, or to obstruct or prevent any person from enforcing or complying with the provisions of this ordinance or any rule, regulation or order of the Commission, or any attempt directly or indirectly to commit any act declared by this ordinance to be an unlawful employment practice."

The municipal ordinance like the sections here referred to contains an exception that the covered entity may discriminate on the basis of sex if sex is a "bona fide occupational qualification."

In that case the Court upheld the adjudication of the Commission on Human Relations of the City of Pittsburgh that newspapers which printed help wanted columns which were segregated by sex and read "Male Help Wanted," "Female Help Wanted," and later were charged to read "Jobs—Male Interest," "Jobs—Female Interest," and "Male-Female" aided the unlawful employment practices of an employer, employment agency or labor organization.

In the one case which might be thought to contain support for a position contrary to our conclusion, *Brush v. San Francisco Newspaper Printing Company*, *supra*, 315 F. Supp. 577, the court construed Title VII, 42 U.S.C. section 2000e-3(b), making it unlawful for an employer, labor organization, or employment agency

to print any advertisement which indicates a preference, limitation, specification, or discrimination based upon sex unless based upon a bona fide occupational qualification. The court found that newspapers running help wanted columns segregated by sex did not violate that section since newspapers were not specifically enumerated entities in the statute.

However, the federal statutory scheme, unlike the Fair Employment Practice Act here does not include a provision making it unlawful to aid or abet in the unlawful employment practice described in 42 U.S.C. section 2000e-3(b). The court therefore did not reach the question posed here.

The conclusion that a newspaper through the placing of ads in columns segregated by sex where there is no bona fide occupational qualification may aid or abet, or in cases where such segregation is not requested by the employer or employment agency may incite or coerce employers and employment agencies in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act does not conflict with the mandates of the First and Fourteenth Amendments of the Federal Constitution that there shall be no laws abridging the freedom of speech or of the press.

It has long been recognized that valid legislation may be enacted to regulate the commercial aspects of speech whether the mode of communication is a magazine, handbill, radio broadcast, or poster on a bus. *See Breard v. Alexandria*, 341 U.S. 622, 71 S. Ct. 920, 95 L. Ed. 1233 (1951); *Valentine v. Chrestensen*, 316 U.S. 52, 62 S. Ct. 920, 86 L. Ed. 1262 (1942); *New York State Broadcasters Ass'n, Inc. v.*

United States, 414 F.2d 990 (2nd Cir. 1969), *cert. denied* 396 U.S. 1061, 90 S. Ct. 752, 24 L. Ed. 2d 755 (1970); *Wirta v. Alameda-Contra Costa Transit Dist.*, 68 Cal. 2d 51, 57 (1967).

The courts have consistently noted the difference between the regulation of advertising content and the editorial and news content of a newspaper. Most recently in *United States v. Hunter*, 324 F. Supp. 529 (D.Md. 1971) the court again noted the difference when it decided that an injunction against violation of subsection (c) of section 3604 of the "Fair Housing" provisions of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601, et seq., would lie against a newspaper publishing advertisements which violate the anti-discrimination provision of said subsection in the proper case and that such an injunction would not constitute an unconstitutional previous restraint on freedom of press.

The court stated:

> "The restrictions in § 3604(d) limit speech only in a commercial context, not in relation to the dissemination of ideas. The Supreme Court and other courts have ruled that commercial activities are not entitled to the same First Amendment protections that are afforded to the expression of racial, religious or political views. [Citations.]" *United States v. Hunter, supra* at 533.

It is therefore concluded that in order to aid or abet in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act, the newspaper must do some act to assist, aid, or promote the unlawful discrimination by the employer or employment agency with knowledge of the unlawfulness of the discrimination. Therefore, a newspaper does

not aid or abet in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act merely by printing "help wanted ads" in columns segregated by sex.

However, a newspaper is a person within the meaning of section 1420, subdivision (f) of the Fair Employment Practice Act and therefore, by printing help wanted ads in columns segregated by sex where the newspaper has knowledge that there is no bona fide occupational qualification for the jobs listed aids or abets in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act.

Moreover, under some circumstances, where such segregation is not requested by the employer or the employment agency, the conduct of a newspaper in suggesting or insisting upon such segregation may constitute incitement or coercion in violation of section 1420, subdivision (f).

The question of whether a newspaper has knowingly aided, abetted, incited or coerced an employer or employment agency in the doing of acts forbidden by section 1420, subdivision (d) of the Fair Employment Practice Act will be a question of fact which may be determined on circumstantial evidence.